Office - Supreme Court, U.S.
FILED
JAN 18 1984
ALEXANDER L. STEVAS,
CLERK

83-1180
No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ISAAC N. GRONER
Counsel of Record
WALTER H. FLEISCHER
JAMES A. BENSFIELD
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-8888

THOMAS R. MEITES
LYNN SARA FRACKMAN
MICHAEL M. MULDER
MEITES & FRACKMAN
135 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does relief granted for violations of Title VII of the Civil Rights Act conform to the strictures of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), that the victims of the discrimination must be made "whole insofar as possible," when the relief denies retroactive competitive seniority to identified victims of discrimination and simply favors incumbent employees, to the extent of rejecting accommodations between the two groups such as granting that seniority to the victims only as openings occur or restoring the victims only to the relative percentile seniority standing which they had when their employment was terminated in violation of the Act?

2. Has the duty required by *Franks* " 'to fashion the most complete relief possible' " and " 'to make the victims of unlawful employment discrimination whole,' " been met, when such relief is denied for any of the following reasons:

A. The victims of discrimination might move to amend the decree in the future;

B. The attractiveness of the position involved has increased, making it more of a permanent career position than a temporary, glamorous one, largely because of the elimination of the employer's rule which was violative of Title VII;

C. After the violation of Title VII had been adjudicated, unusually long litigation delays, caused by invalid legal positions taken by the employer, resulted in the hiring of a substantial number of new employees before the class was granted relief;

D. The presence of flight attendants in furlough status and predictions of no hiring are largely responsible

for the findings of "unusual adverse impact" even though the victims of discrimination are willing to accept reinstatement to their positions only as job openings arise; or

E. The employer threatens to create "false vacancies" if such relief is granted?

PARTIES TO THE PROCEEDINGS

(a) Petitioner Liane Buix McDonald is a Plaintiff, representing a class of female United Air Lines flight attendants. She was an Appellant-Cross-Appellee in the Court below.

(b) Respondent United Air Lines, Inc., is a Defendant. It was an Appellee-Cross-Appellant in the Court below.

(c) Respondent Association of Flight Attendants intervened in the District Court to represent the interests of incumbent United Air Lines flight attendants. It was an Appellee in the Court below.

(d) Carole Anderson Romasanta, and eleven other named individuals,* were respectively the original named Plaintiff and subsequent Intervenors who obtained relief. A final Judgment as to them was entered in 1975, and thereafter Petitioner McDonald has represented the class.

(e) Joyce Barr, one member of the class, filed separate briefs, denominated those of an "intervenor," although she has not sought nor been granted leave to intervene.

---

* Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles and Joanne Hamersley.

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 12
Allen v. Amalgamated Transit Union, Local 788, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977) 8
Association Against Discrimination v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) 8, 15
EEOC v. American Telephone & Telegraph Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) 9-10
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) ..... *passim*
Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981) 8
Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978) 8
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 12
Lee v. Macon County Board of Education, 453 F.2d 1104 (5th Cir. 1971) 14
Louisiana v. United States, 380 U.S. 145 (1965) 12
McDonald v. United Air Lines, Inc., 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979) 2, 5
Moore v. City of San Jose, 615 F.2d 1265 (9th Cir. 1980) 8
Moseley v. Goodyear Tire & Rubber Co., 612 F.2d 187 (5th Cir. 1980) 8, 9
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 11
Porter v. Lee, 328 U.S. 246 (1946) 14
Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) 8
Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979) 8

TABLE OF AUTHORITIES—Continued

	Page
Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983)	9, 14
Sprogis v. United Air Lines, Inc., 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971)	2, 4, 8
Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom.* Firefighters Local Union No. 1784 v. Stotts, 462 U.S. ——, 103 S.Ct. 2451 (1983)	9, 16
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	11
United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), *affirming* Romasanta v. United Air Lines, Inc., 537 F.2d 915 (7th Cir. 1976)	2, 4, 5
Watson v. City of Memphis, 373 U.S. 526 (1963)	13
Statutes:	
Title VII, Civil Rights Act of 1964	
42 U.S.C. §§ 2000e *et seq.*	4
Section 703(a), 42 U.S.C. § 2000e(2)(a)	3
Section 706(g), 42 U.S.C. § 2000e(2)(g)	3-4
United States Code	
28 U.S.C. § 1254(3)	3
28 U.S.C. § 1292(b)	2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Liane Buix McDonald, on her own behalf and as representative of a class of female flight attendants whose employment with Respondent United Air Lines was terminated because of the employer's discriminatory "no-marriage" rule, petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois which was the subject of the Appeal below was entered

on January 12, 1982 (App. 40a).[1] The Memorandum Opinion is unofficially reported at 31 FEP Cases (BNA) 551. The Order implementing that decision and containing the certification required for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), was entered on July 14, 1982 (App. 94a). The Opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a), and its Judgment (App. 99a), were entered on September 21, 1983. That Opinion is reported at 717 F.2d 1140.

The pertinent earlier opinions in this case or related cases include the following:

1. *Sprogis* v. *United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (these decisions established that the "no-marriage" rule violated Title VII of the Civil Rights Act);

2. *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), *affirming Romasanta* v. *United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *reversing* unpublished Order (N.D. Ill. October 4, 1975) (the appellate decision held that Petitioner should have been granted leave to intervene for purposes of appealing denial of class certification); and

3. *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), *reversing* unpublished Order (N.D. Ill. March 1, 1978) (the appellate decision held that the class should be defined, as requested by Petitioner, to include all persons damaged by the no-marriage rule (within certain time limits)).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on September 21, 1983 (App. 1a, 99a). A timely Petition for Rehearing with Suggestion for Rehearing *En Banc* was

[1] "App." refers to the Appendix to this Petition.

filed on October 5, 1983, and denied on October 20, 1983 (App. 101a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(3).

STATUTORY PROVISIONS

The pertinent provisions of Title VII of the Civil Rights Act are §§ 703(a), 42 U.S.C. § 2000e(2)(a), and 706(g), 42 U.S.C. § 2000e(5)(g), which respectively read as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
>
> * * * *
>
> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back

pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

This action, which now presents issues as to the propriety of denying rightful place seniority to the identified victims of discrimination whose employment was terminated in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Act"), attacked the rule of Respondent United Air Lines ("United") which required the discharge of any female flight attendant who married. This suit was filed in the United States District Court for the Northern District of Illinois in May 1970, by Carole Anderson Romasanta on behalf of a class of United flight attendants. Jurisdiction of the District Court was invoked under 42 U.S.C. § 2000e.

By June 1971, the illegality of the rule had been definitively settled in a related case, *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Since that time, for more than twelve years, the focus has been entirely upon the class action and remedial aspects of the dispute. Much of the relevant procedural history is summarized in the Opinion of this Court in *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), *affirming Romasanta* v. *United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), and the Opinion below (App. 2a-5a).

In brief, the District Court in December 1972 denied class certification. The Seventh Circuit denied an application for an interlocutory appeal, which the District Court had certified, from the December 1972 Order. In 1975, after a final Judgment was entered in favor of the individually named Plaintiffs, those Plaintiffs decided not to prosecute an appeal from the denial of the class certification. At this point, Petitioner McDonald sought to intervene on behalf of the class in order to pursue such relief. Ultimately she was successful, *see McDonald, supra*, 432 U.S. 385, and she has since represented the class. Subsequently, the District Court entered an Order limiting the class to those persons who had been terminated and excluding those who had resigned because of the no-marriage rule. That Order was reversed, *sub nom. McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). The present dispute centers on the thus-far successful effort of United and the Association of Flight Attendants ("AFA") to parlay the litigation delays and the interim hiring into a determination that Petitioner's class should be wholly denied competitive seniority retroactive to the time their employment was terminated, and instead should be accorded, upon being rehired, seniority for competitive purposes limited to that earned before their termination 15 or more years ago.

During the lengthy period after the no-marriage rule was held invalid in 1971, United hired thousands of new flight attendants.[2] Approximately 8,700 flight attendants

---

[2] An exhibit introduced by United in the District Court (United Trial Ex. 4) reflects that it hired the following number of flight attendants in the years after the employment of Plaintiff's class was terminated:

1969—1,745	1975— 0
1970—1,471	1976— 589
1971— 0	1977— 820
1972—1,778	1978— 803
1973—1,816	1979—1,143
1974— 166	

(of whom over 1,250 were on furlough) were employed by United in April 1981 (App. 18a). The District Court estimated that the class would include approximately 1,400 members.[8]

In capsule, the District Court held that if all members of the class were immediately reinstated with full competitive seniority, there would be an "unusual adverse impact" on the incumbents, principally because some of them might be furloughed; those already furloughed would be lower on the recall list; and they would be subject to transfer of domicile, the geographic base from which attendants bid for assignments. While it did grant the class retroactive seniority in those respects which had no effect on the incumbents, such as pay, days of vacation, and flight passes, it declared that "[f]or all other purposes . . . the McDonald claimants' seniority will be adjusted to reflect the actual amount of seniority accrued during their tenure as flight attendants before they were forced to terminate under the no-marriage rule" (App. 88a).

The District Court rejected all solutions to the competitive seniority problem which would have accommodated the interests of the victims and the incumbents. Petitioner had urged that the class be reinstated with full seniority only as openings occurred; that is, without causing the discharge of any incumbents. This approach was rejected because the District Court thought that it

---

[8] The Court accepted the estimate that 1400 of the approximately 1700 former flight attendants identified as potential class members would be entitled to reinstatement (App. 65a-66a), a figure which Petitioner contended below was substantially overstated. The exact number of persons entitled to reinstatement will not be known until hundreds of individual hearings before a Master are completed.

As the Court below recognized, even with the 1400 figure, the proportion of discriminatees to incumbents was comparable to or less than that in *Franks* and other cases in which retroactive comparative seniority had been awarded (App. 18a).

might take a substantial period before there were sufficient openings, and Petitioner had stated that if the delay was in her view excessive she might return to Court in two and a half to three years for further relief (App. 87a).

Likewise, the District Court rejected Petitioner's alternative suggestion that the class be dovetailed into the seniority roster by placing its members at positions relative to those they held when terminated. Such relief would have spread them fairly evenly among all United flight attendants in terms of seniority. The essential rationale for rejecting this specific proposal was that during the course of the litigation the job had changed from one perceived as a temporary and glamorous one to a career position (App. 27a-28a). Although the denial of seniority to the class generally was justified on the ground of the "flexibility" of equity (App. 89a), the effect of the order was to accept the inflexible opposition of United and the AFA to any accommodation, and to return the victims to seniority positions much worse than when the discrimination took place. *See*, p. 10, *infra*.

On an interlocutory appeal certified under 28 U.S.C. § 1292(b), the Seventh Circuit affirmed the District Court's decision in all respects, substantially adopting its reasoning (App. 1a-39a).

REASONS FOR GRANTING THE WRIT

I.

The judgment below is irreconcilable with *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and the decisions of other Courts of Appeals adhering to *Franks*. In *Franks*, this Court established the fundamental principles for providing relief to victims of discrimination in violation of Title VII of the Act. This Court declared that the District Courts must " 'fashion the most complete relief possible . . . . [T]he Act is intended to make the victims of unlawful employment dis-

crimination whole,'" *id.* at 764, quoting the pertinent Senate Report, even if "such relief diminishes the expectations" of incumbents. *Id.* at 774. In particular, this Court held that the presumption must heavily be that discriminatees are entitled to be rehired with retroactive seniority.

This is, so far as Petitioner is aware, the first reported case since *Franks* in which a class of identified victims of discrimination has been denied retroactive seniority. The appellate decisions which have insisted that such seniority be granted, rejecting arguments similar to those adopted by the Court below, include, *e.g.*, *Moore* v. *City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 287-288 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187, 191 (5th Cir. 1980); *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881-882 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); and *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981).[4]

The Court below acknowledged that its approach was different from that of other Courts of Appeals (App. 17a, n.6). It knew it was interpreting *Franks* in a man-

---

[4] Indeed, other United flight attendants whose employment was terminated because of the "no-marriage" rule have been afforded full retroactive seniority. *Sangster* v. *United Air Lines, Inc.*, 632 F.2d 864, 865-866 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Inda* v. *United Air Lines, Inc.*, 565 F.2d 554, 557 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Sprogis* v. *United Air Lines, Inc.*, 308 F. Supp. 959, 961 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In October 1969, United and AFA agreed that return to flight attendant positions with restoration of full seniority would be offered to all who had transferred to ground jobs because of the rule and were still so employed, as well as to those who had filed a union grievance or an EEOC charge (AFA Trial Ex. 2).

ner uniquely unfavorable to discriminatees. This Court should not countenance such a blatant disregard of its teachings. To reverse this judgment promptly is of importance, inasmuch as the grounds relied upon by the Courts below to depart from the norm of full seniority relief are ones which could all too readily be used in many other situations to deprive *Franks* of vitality.

Where incumbents may be affected by the granting of relief to a class of discriminatees, other Courts of Appeals have concluded that the appropriate accommodation is to avoid "bumping" incumbents, but, in return, to grant preference in hiring to the victims by reemploying with full retroactive seniority as openings occur. *E.g.*, *Moseley* v. *Goodyear Tire & Rubber Co.*, *supra*, 612 F.2d at 191-192; *Spagnuolo* v. *Whirlpool Corp.*, 717 F.2d 114, 120 (4th Cir. 1983). Those Courts have concluded that this pattern of accommodation affords reasonable protection to incumbents against job loss, while affording meaningful relief to the victims, by requiring the phasing of the discriminatees into active employment over a period of time. The decision below rejects this course followed by sister Circuits.

Other Courts indeed have accorded victims relief denied the class here in cases in which the balance of equities was far less favorable to them than in the present situation, as where the Court went beyond a settlement in which an employer had agreed to hire members of a class who may not have been individually subjected to discrimination, but were merely members of a race generally discriminated against by the employer, and held that the seniority system would not thereafter be allowed to operate against the new hires, *e.g.*, *Stotts* v. *Memphis Fire Department*, 679 F.2d 541, 564-567 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983); or where retroactive seniority has been accorded "new hires" and not restricted to clearly identifiable victims of the discrimination, *EEOC* v. *American Telephone & Tele-*

graph Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

In cold reality, the Court below has marched in the opposite direction from *Franks*: It has transformed the narrow escape hatch language of *Franks*, that the District Courts in formulating seniority relief may take measures to avoid "unusual adverse impact" upon incumbents, 424 U.S. at 779, n.41, to justify *eschewing* the compromise generally adopted to avoid such an unusual impact, and even to justify eschewing accommodations, such as comparative seniority, which are much less favorable to the discriminatees. Significantly, the Courts below, in asserting that such an "unusual adverse impact" was present here, focused upon the impact that would occur if all the class were reinstated at once (App. 21a-26a), and improperly equated that impact with any which would result from such accommodations. Whether any such approach should be sanctioned is an important and recurrent question of the remedial aspects of Title VII, which warrants plenary consideration by this Court.

While both the Courts below discussed at length the potential effect upon incumbents of immediate reinstatement of the entire class, neither discussed the effect upon the class of this denial of full seniority. Under this decision less than 1 percent of the class will be in the top half of the seniority list, some 8 percent in the third quarter, and more than 90 percent in the bottom quarter. In contrast, when their employment terminated because of the discriminatory rule, 16 percent of the class was in the upper quarter of the seniority roster; 26 percent in the second quarter; and 35 percent in the third (Record in Court below, R. 431). The class therefore will suffer to a far greater degree the adverse effects of loss of seniority than the portion of the incumbents which gradually would be affected if Petitioner's return-on-openings approach prevailed. Such a result is antagonistic to *Franks* and flouts its ultimate prescription that victims of discrimination must be accorded as complete relief as possible.

II.

The reasons given by the Court below for its decision are themselves further inconsistent with *Franks*, as well as with settled principles of equity.

1. The Court denied the openings proposal because the discr[illegible]dicated that they desired to be reinstated [illegible]asonable period; and if this did not occur, the[illegible]gnt [illegible]n to the Court for appropriate relief (App. 25a-26a). To deny relief which is appropriate now, because the beneficiaries may seek to modify it in the future in the light of subsequent developments, is plainly inconsistent with the teachings of this Court that any party has a right to seek revision of the decree in light of events, *see, e.g., Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976); *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961), and an abuse of discretion. To penalize litigants because they reserve a traditional right of a party is a like error and abuse.

Furthermore, the judgment that no relief should be awarded because of the Court's assumption that reinstatements could not be accomplished within a pre-set time period is manifestly unjust and illogical. It is unjust to deny some relief because full relief may take too long. It is illogical to believe that the future may be so precisely predicted that any requested or possible adjustments to the actual situation as it develops should be forestalled. Justice delayed is better than justice now denied.[8]

---

[8] The error of this approach is shown by the facts, which came to light during the pendency of the appeal and were made known by Petitioner to the Court of Appeals, that United had recalled to active service all of the more than 1,250 flight attendants who were on furlough, and also was training people for possible openings in 1984 (Petition for Rehearing, 6-7). Nevertheless, a portion of the "adverse impact" described below was that furloughees would not be able to return to active employment and might even be dropped

The Court below labelled a "condition" Petitioner's announced intention to move to amend the decree if reinstatements of the victims were not completed within the stated time (App. 25a-26a). It held that this "condition" rendered the normal openings approach unavailable. Petitioner never characterized her statement as a "condition." In any event, invocation of that word is not a justification which this Court should tolerate for failing to fashion an equitable result. Particularly in a Title VII case, the Court has an independent obligation to disregard or modify an inappropriate condition to provide the remedies mandated by this Court.

In a Title VII case, the Federal Courts "have '"not merely the power but *the duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past . . . ."'" *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977) (emphasis added), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975), which relied on *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). Contrary to this duty, the Courts below rejected the "openings" proposal made by the discriminatees, without any genuine attempt to devise any other relief consistent with the purposes of the Act or to amend or adapt Petitioner's proposal to the requirements of justice under the circumstances. The District Court considered its function performed when it rejected the proposals as tendered by the discriminatees; and the Court below agreed. An approach so passive to providing equitable relief under Title VII cannot be squared with the mandates of this Court. The judgment below reflects an abdication of judicial responsibility which demands corrective action by this Court.

---

from the rolls, if the discriminatees were promptly reinstated (App. 29a-30a). In fact, not only have the furloughees been called back, but also now United has had immediate openings for those 105 members of the class who thus far have been reinstated (albeit with limited seniority) as the consequence of further proceedings in the District Court.

2. The most bitter of the unjustifiable standards mobilized against the discriminatees is that the flight attendant position involved "was once viewed as a temporary, glamorous job [but] is now considered a career position" (App. 28a). The cruel irony is that the main generator of this change was the elimination of the discriminatory "no-marriage" rule, branded as illegal in this very litigation. It was a "temporary, glamorous job" precisely because the predicate was that only single women should have it; and the implicit assumption was that they would consider the job primarily as an opportunity to get married or an interval before marriage, rather than as a career in the then generally masculine meaning of "career." Those who found this presumption unacceptable, who considered the rule sexist and illegitimate, and have succeeded in this litigation, now have their vindicated positions cited as a basis for denying them relief. It is difficult to imagine a more egregious disregard or noncomprehension of the purposes of civil rights legislation. Hostility to the precepts of such legislation cannot be a proper basis for limiting relief. *Cf. Watson* v. *City of Memphis*, 373 U.S. 526, 531 (1963).

Also unrecognized below is the fact that the incumbents have been enjoying the benefits of the attack against this discriminatory rule. They may marry or plan on marriage without loss of the job. Equity counsels that those who conferred the benefits are entitled to more understanding and favorable consideration, vis-a-vis the incumbent beneficiaries, even than is normally the case and certainly than was afforded below. The employment of an utterly improper criterion for denying relief and the grievous departure from equity, contrary to the principles promulgated by this Court to effectuate the remedial purposes of the Act, merits review by this Court.

3. The judgment below undermines the remedial purposes of the Act by penalizing the class for litigation delays, and in weighing the effects of such delays exclu-

sively in favor of incumbents and simply affording no consideration of its impact upon the victims of discrimination. As the Statement above indicates, this case has consumed over a decade, as a result of legal issues raised against Petitioner's class by United. The latter's right to litigate positions ultimately rejected should not result in special protection for those employed while it was litigating, as the Courts below inferred. They failed to realize that this result encourages obstructive and delaying tactics in Title VII litigation. Such tactics would be rewarded, if the judgment below remains unreviewed, by reducing, indeed minimizing, the relief that could be obtained by the victims. The more incumbents, the fewer opportunities for meaningful relief. The judgment below thus works effectively to frustrate, rather than to fulfill, the purposes of the Act and the mandates of this Court enforcing the Act.

Moreover, the District Court departed from those purposes, with the approval of the Court below, by concentrating on the potential impact upon the class of incumbents swollen in numbers by the delay in litigation, without placing on the scales of equity the practical impact upon the class of discriminatees. The exceptionally long delay in obtaining reinstatement or any other relief will be continued, and with no ready end in sight. When reinstated, the class members will have only such truncated seniority as to condemn them to severely subordinated positions on the seniority ladder. Accommodations which have enabled other victims of discrimination to gain some meaningful retroactive competitive seniority have been denied them, through no fault of their own.

On the other side of the scale, under settled principles, those who become incumbents under such circumstances have diminished equities. *E.g.*, *Lee* v. *Macon County Board Of Education*, 453 F.2d 1104 (5th Cir. 1971); *Spagnuolo* v. *Whirlpool Corp.*, *supra*, 717 F.2d at 122; *see generally Porter* v. *Lee*, 328 U.S. 246, 251 (1946).

Those who entered the flight attendant position after the invalidity of the rule had already been established should not be heard to say that it is an "unusual adverse impact" for those awaiting relief to be favored in seniority over them. The judgment below cannot be reconciled with *Franks* or the Act.

4. The Courts below were persuaded to deny the victims of discrimination retroactive competitive seniority relief primarily on the basis of predictions that, because of economic conditions, there would be no growth in the need for flight attendants in the next few years, and United already had some 1,200 employees on furlough. These conditions, the Court below declared, were "[p]articularly relevant to disposition of this case" (App. 8a) and "extremely relevant to the present case" (App. 18a); and it concluded that "the economic conditions affecting United . . . are largely responsible for the finding of 'unusual adverse impact'" (App. 39a). In placing such overweening emphasis on the economic conditions allegedly facing the employer, the Court acknowledged that its approach in considering whether there was an "unusual adverse impact" on incumbents was not in accord with that of other Circuits, especially that of the Second Circuit in *Association Against Discrimination* v. *City of Bridgeport*, *supra* (App. 17a).

This Court intended that the "unusual adverse impact" exception should be narrowly applied, lest it inhibit or prevent achievement of the purpose of the Act to eradicate the effects of discrimination. *See Franks*, *supra*, 424 U.S. at 779, n.41. The denial of relief in this case based on economic conditions of the employer (which had employees on furlough with projections that it would not be hiring employees in the affected classification) is particularly unfair to victims of discrimination who were willing to assume the risk that the employer's economic condition would improve by proposing to return only as open-

ings occurred.[6] Whether the economic conditions of an employer should be accorded such exceptional deference in relieving the employer of the normal result that retroactive seniority would be awarded is an issue of great and continuing significance to the enforcement of Title VII, warranting consideration by this Court. *Cf. Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983) (appropriate sharing of remedial relief between persons who are not identified victims of employment discrimination and incumbents under adverse economic conditions).

5. The Court below in denying seniority relief to the class relied upon yet another impermissible factor: It held that if an openings approach were followed there might be an adverse impact upon incumbents because United was threatening to create "artificial vacancies" and "false vacancies" by which it would terminate incumbents in order promptly to hire discriminatees and lessen the monetary compensation owed them (App. 26a-27a). This holding is a severe threat to the integrity of decrees under Title VII and should not be countenanced by this Court.

First, any unscrupulous employer could create "false vacancies"; that possibility certainly does not present a situation "that would not be generally found in Title VII cases," *Franks*, *supra*, 424 U.S. at 779, n.41. Further, it is improper for the Court to deny equitable relief because of unseemly threats of the discriminating employer to use inequitable artifices in order to limit the reach of Title VII relief. The proper reaction to such a threat is to broaden the injunction to prevent such actions of the employer, not further to harm the victims of the dis-

[6] As discussed at pp. 11-12, n. 5, *supra*, the employer's economic condition did improve and openings presently exist for returning class members.

crimination. Such defiance is ground for strengthening, not lessening, the relief.

The judgment below is thus so grossly wide of the mark of providing "make whole" relief and respecting the presumption in favor of rightful place seniority demanded by *Franks* as to call for review and reversal by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ISAAC N. GRONER
Counsel of Record
WALTER H. FLEISCHER
JAMES A. BENSFIELD
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-8888

THOMAS R. MEITES
LYNN SARA FRACKMAN
MICHAEL M. MULDER
MEITES & FRACKMAN
135 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

January 1984